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Supreme Court of the United States

October Term, 1944. No. 822.

CHARLES FRANKLIN,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

MANHATTAN RAILWAY COMPANY and CHARLES FRANKLIN,

Petitioners,

vs.

THE CITY OF NEW YORK; CHARLES FRANKLIN and others, as Committee for Modified Stock of Manhattan Railway Company; THEODORE S. WATSON and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; HAROLD PALMER and others, as Committee for 7% Guaranteed Stock of Manhattan Railway Company; and CHEMICAL BANK & TRUST COMPANY,

Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

January 29, 1945.

IGNATIUS M. WILKINSON,
Corporation Counsel,
Solicitor for the City of New York.

LEO BROWN,
LOUIS M. WEINTRAUB,
BENJAMIN OFFNER,
of Counsel.

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Preliminary Statement

Petitioner Charles Franklin, as attorney for Manhattan Railway Company (hereinafter referred to as "Manhattan"), seeks review of an order of the Circuit Court of Appeals, Second Circuit, affirming allowances of $35,000 to him for services rendered on behalf of Manhattan and for the benefit of the receivership estate in the Interbor-

ough-Manhattan receivership proceeding (R. 2467). In addition petitioner had previously received allowances aggregating $57,500 for such services in that proceeding (R. 123, 1009). Thus he has received allowances aggregating $92,500.

The allowances of $35,000, which petitioner asks this Court to review, were made in the discretion of the District Court and the Circuit Court of Appeals in an equity receivership, and in making them the Courts below exercised a reasonable and sound discretion. No question is presented, therefore, justifying review by this Court.

Summary Statement of Facts

In the Interborough-Manhattan receivership proceeding,* the Manhattan Receiver and the Trustee of the Manhattan Consolidated 4% Mortgage were represented by separate counsel from the outset (R. 2213). The Manhattan Consolidated 4% Bondholders' Committee (Merle-Smith Committee), the Palmer Committee for Manhattan 7% Stock, and the Trustee of the Manhattan Second Mortgage, all intervened early in the proceeding and each was represented by counsel (R. 2213-2214). All of these received allowances (R. 117-120, 161). On November 11, 1932, petitioner was elected Manhattan's general counsel, and on January 30, 1933, he became its solicitor (R. 121, 122). He also served as counsel to the Manhattan 5% Stockholders' Committee until 1938, and from then on as co-counsel (R. 2214).

* The history of the receivership proceeding and the nature of the legal relations among Interborough, Manhattan, their respective security holders, and the City of New York, are fully set forth in *Manhattan Railway Co.* v. *Central Hanover Bank & Trust Co.*, 99 F. (2d) 789 (1938), cert. den. 306 U. S. 641 (1939); *Murray* v. *Roberts*, 103 F. (2d) 889 (1939); *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, 122 F. (2d) 454 (1941), cert. den. *sub nom. Manheim* v. *Merle-Smith*, 315 U. S. 801 (1942), and in the interest of brevity will not be restated here.

In August 1940, after petitioner had received allowances aggregating $77,500, he filed a supplemental petition seeking an additional allowance (R. 121-129). In order to determine whether he was entitled to any further allowance, the District Court referred this question to a Special Master. The Circuit Court of Appeals has pointed out that the Special Master "took a vast amount of evidence and made a lengthy and detailed report" (R. 2450). After a full analysis of the evidence upon every item of services claimed to have been rendered (R. 2212-2238), the Special Master concluded that petitioner "secured very few ascertainable benefits for the equities which he represented" (R. 2248). As the Special Master found in connection with each of the claimed services, petitioner's activities were mainly duplicative of the efforts of the parties who had, and actually fulfilled, the primary responsibilities of protecting Manhattan's interests, such as the receiver, his counsel, the various protective committees and their counsel (see *e. g.*, R. 2216, 2219-2221, 2223, 2224, 2226, 2228, 2229, 2234-2236, 2238, 2248-2249). The Special Master reported that petitioner was not entitled to receive any further allowance, since he had already been fully compensated for all of his services (R. 2248, 2254-2255). None of the Special Master's findings was reversed by the District Court or the Circuit Court of Appeals. Both Courts, in the exercise of discretion, modified the report only by making an additional allowance of $15,000 to petitioner for his services as general counsel for Manhattan (R. 2430, 2432, 2434, 2450-2451).

Allowances Made to Petitioner

On December 10, 1934, petitioner received an allowance from Judge MACK, payable out of the receivership estate, of $3,000 a year for his services in connection with keeping the Manhattan corporate organization alive, aggregating $22,500 (R. 2207, 2236-2237). On June 24, 1940, Judge PATTERSON made an allowance of $70,000 to petitioner and his co-counsel for services rendered on behalf of Man-

hattan and its 5% Stock Committee, of which petitioner received $35,000 (R. 1009). This allowance was paid out of amounts allocated to the Manhattan 5% Stockholders under Art. Six, par. (6), of the Interborough-Manhattan Unification Plan (R. 1536-1580; 2250-2251, 2253-2254). No appeal was taken from this order.

On July 3, 1940, Judge PATTERSON allowed petitioner $20,000 in full for his services in the receivership cause, payable out of the receivership estate pursuant to Art. Six, par. 8(d), of the Unification Plan (R. 7-103, 110-113, 119, 120, 2253-2255). On an appeal taken by petitioner from this order, the Circuit Court of Appeals increased the allowance to $35,000 (R. 2467).

On August 29, 1940, petitioner filed a Supplemental Petition, seeking an additional allowance of $325,000, under Art. Six, par. (6), of the Unification Plan, payable out of the amounts allocated to Manhattan Stock, alleging the very same services for which Judge PATTERSON had already made the allowance of $20,000 (R. 121-129). It was this petition which the District Court referred to the Special Master (R. 162). Although the Special Master recommended no further allowance to petitioner, the District Court, without disturbing any of the findings, awarded petitioner $15,000 for general counsel services, payable out of the fund allocated to the Manhattan 5% Stock. This allowance was made upon the Special Master's statement that petitioner's services as general counsel were worth no more than $5,000 a year, upon which he already had been paid $3,000 a year (R. 2247, 2431-2434).

The Circuit Court of Appeals agreed with the District Court that petitioner be allowed the additional $15,000, but held that it was properly payable out of the receivership estate and not out of the funds allocated to the Stock. Therefore, it reversed District Judge HULBERT's order, and modified Judge PATTERSON's order by increasing the $20,000 allowance to $35,000 (R. 2450-2451, 2467).

Apart from alleged benefit to the receivership estate, petitioner also based his claim for a further allowance

upon alleged contracts with Manhattan providing for the payment to him of fixed fees (R. 1264, 1289-1291, 2046-2048). The Special Master found that no contract whatever existed for the payment of $250,000 to petitioner as Manhattan solicitor (R. 2244-2247), and that the contract to pay him $15,000 a year as general counsel was unenforceable (R. 2240-2244). The District Court did not enforce any agreement, and the Circuit Court of Appeals expressly held that any allowance to be made must be based, not upon contract, but upon benefit to the receivership estate (R. 2448-2450). Thus, the allowances which petitioner asks this Court to review were made in the discretion of the Court under the Unification Plan and in accordance with general principles governing allowances in equity receiverships, after unusually detailed and thorough consideration of all his services, with which the Court was fully familiar.

ARGUMENT

Under the Unification Plan all allowances to counsel were to be fixed in the discretion of the Court. The action of the Courts below in fixing the allowances to petitioner constituted a reasonable exercise of discretion.

(a)

Allowances to attorneys in the Interborough-Manhattan receivership proceeding were governed by the provisions of the Unification Plan. Though the Plan provides in Article Six, par. (3), that the City shall assume Manhattan's obligations under "Existing Agreements", this latter term is defined in definition (12) as excluding "contracts or agreements relating to the employment of counsel" (City's Exh. 58, p. 7 [Not printed pursuant to stip., R. 2441-2442]). Moreover, Art. Six, par. 5(d), provides that the City will not assume and pay (City's Exh. 58, pp. 43-44):

> "Any legal * * * expenses or compensation of * * * the Manhattan Railway Company, other than any allowance which may be made by the District Court pursuant to the provisions of subdivision (d) of paragraph (8) of this Article * * *."

Article Six, par. 8 (d), provides for compensation for services rendered to, and to be paid from, the receivership estate. The portion of the paragraph specifically referring to petitioner provides that the City will pay (City's Exh. 58, p. 47):

> "* * * allowances, *if any, which may be made by the District Court* to the solicitor and general counsel of the Manhattan Railway Company for his services and disbursements in the receivership and related proceedings * * *." (Italics ours.)

Article Six, par. (6), also contains provision for compensation to Manhattan for its legal expenses, to be paid from funds allocated under the Plan to Manhattan Stockholders. The applicable portion of the paragraph provides (City's Exh. 58, p. 45):

> "The legal, accounting, engineering and other expenses and compensation of the Manhattan Railway Company (except as otherwise provided in subdivision (d) of paragraph (8) of this Article with respect to the solicitor and general counsel of the Manhattan Railway Company), *whether heretofore or hereafter agreed to be paid or whether heretofore or hereafter incurred* in the receivership proceedings or in securing assents to the Plan or in the negotiation and consummation of the Plan or otherwise, *all subject to the approval of the District Court*, shall be paid out of the Corporate Stock allocable under Article Four of the Plan to the Guaranteed 7% Stock and the Modified Guaranteed 5% Stock of the Manhattan Railway Company in the proportions determined by the District Court." (Italics ours.)

These are all of the provisions of the Unification Plan which controlled the allowances made to petitioner. It is clear, as the Circuit Court of Appeals held (R. 2448-2450),

that under the Plan, contracts for payment of legal services are unenforceable. Both under Art. Six, pars. (6) and 8 (d), all allowances were to be fixed in the discretion of the Court. They were to be governed by the general principles applicable in receiverships, namely, benefit to the receivership estate. *Palmer* v. *Watson*, 122 F. (2d) 598 (2nd Cir., 1941); *Johnson* v. *Bankers Trust Co.*, 122 F. (2d) 552 (2nd Cir., 1941). In applying these principles to the provisions of the Unification Plan, the Circuit Court of Appeals, in the instant case and in the cases cited above, followed the well-established rule that contracts for the payment of legal fees are unenforceable in receivership proceedings. See *In re Insull Utility Investments Inc.*, 74 F. (2d) 510 (7th Cir., 1935); *In re Bush Terminal Co.*, 84 F. (2d) 984 (2nd Cir., 1936); *Wright* v. *City National Bank & Trust Co.*, 104 F. (2d) 285 (6th Cir., 1939); *Silver* v. *Scullin Steel Co.*, 98 F. (2d) 503 (8th Cir., 1938); *In re McCrory Stores Corporation*, 91 F. (2d) 947 (2nd Cir., 1937), cert. den. *sub nom. Cooper* v. *Irving Trust Co.*, 302 U. S. 725 (1937); *Bethlehem Steel Co.* v. *International Combustion Engineering Corp.*, 66 F. (2d) 409 (2nd Cir., 1933).

Petitioner seeks to escape the consequences of this rule by asserting that Manhattan's stockholders are personally liable for the payment of legal fees under his alleged contracts with Manhattan. That position is untenable. Under the Unification Plan, Manhattan's assets were not purchased from the corporation, and the corporation received no payment for them. The Plan constituted an offer to individual security holders. When it was consummated, Manhattan was left without assets, and all payments were made directly to security holders. *American Brake Shoe and Foundry Co.* v. *Interborough Rapid Transit Co.*, *supra*, 122 F. (2d) 454, cert. den. 315 U. S. 801. In *Palmer* v. *Watson*, *supra*, 122 F. (2d), at p. 600, the Court refused to enforce a contract against stockholders upon the ground that "the payment by the City [to Manhattan's stockholders] were the proceeds of the receivership property in the custody of the court for distribution in accordance with the plan."

This case, therefore, differs from those cited by petitioner (Brief, p. 15), where contracts were enforced against the parties who made them when those parties survived reorganization with assets. Here, as the Circuit Court of Appeals noted (R. 2450): "the funds sought to be charged belong to the stockholders as such; they do not take them by distribution of corporation assets."

In any event, such contracts are unenforceable by reason of the provisions of the Borah Act (tit. 28, U. S. Code, § 572a). *In re Trans-State Oil Co.*, 24 F. Supp. 454 (Dt. Ct., Tex., 1938), rev'd on other grounds *sub nom. Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.*, 99 F. (2d) 650 (5th Cir., 1938); *In re Memphis Street Ry. Co.*, 28 F. Supp. 358 (Dt. Ct., Tenn., 1939), rev'd on other grounds *sub nom. Fuller* v. *Memphis Street Ry. Co.*, 110 F. (2d) 577 (6th Cir., 1940).

(b)

Clearly, this is the usual case of allowances to counsel in a receivership proceeding, made in the discretion of the Court. The Court which had jurisdiction of the proceeding and in which the work was actually performed is peculiarly equipped to appraise the worth of the services performed by counsel. As has been said, such Court "has a fuller and better knowledge than any other court could possibly obtain of the extent and character of the services and of their value to the estate being administered." *Trustees Corporation* v. *Kansas City M. & O. Railway Company*, 26 F. (2d) 876, 880 (8th Cir., 1928).

Hence, the fixing of such allowances will not be disturbed unless there has been a clear abuse of discretion. *Trustees* v. *Greenough*, 105 U. S. 527, 537 (1881); *Stuart* v. *Boulware*, 133 U. S. 78, 81-82 (1890); *Cake* v. *Mohun*, 164 U. S. 311, 317-318 (1896); *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 388-389 (1940).

In the instant case, petitioner certainly has no meritorious complaint. Three separate District Courts passed

upon his allowances; a Special Master heard voluminous testimony; and the Circuit Court of Appeals reviewed the whole record. After such careful consideration, no further review by this Court is warranted.

(c)

Petitioner asserts (Brief, p. 22) that the City indulged in a "vindictive personal attack upon petitioner for which there was no justification", and quotes (Brief, p. 23) the following excerpt from our brief in the Court below: "In his attempt to obtain an allowance in this proceeding, Franklin's conduct and testimony were calculated to mislead the Court. Consequently he forfeited any right to an allowance". Petitioner claims that this was a "calumny", based upon "counsel's unsupported opinion" (Brief, p. 23).

Petitioner evidently overlooks the fact that the Special Master specifically found that he had attempted to mislead the Court and had given false and evasive testimony. The Special Master said (R. 2238-2240):

> "Under the circumstances of this proceeding, the probative value of the proof submitted by Franklin requires some comment. Aside from documentary evidence, Franklin was the principal and, with general exceptions, the only witness concerning the nature, extent and importance of his services. Upon cross-examination his credibility became seriously involved. Contrary to his testimony on direct and preliminary cross-examination that he had long and responsible legal experience in corporate, financial and advisory work for the Southern Pacific Railroad System, it was established that Franklin's experience up to 1930 had been almost entirely confined to the preparation and trial of litigated cases (S. M. 61-63, 823-830, 841-855 [fols. 566-70, 2107-2123, 2145-76]; City's Ex. 27). Moreover, his testimony as to the extent of the earnings from his law practice and the sources thereof, exclusive of his services for the Southern Pacific was unconvincing and, upon cross-examination, confused and evasive (S. M. 842, 843, 490-494 [fols. 2146-50, 1450-60]; Pet. Ex. 194). From examination of other

testimony and exhibits, I have concluded that Franklin's estimates of the value and importance of his services in the Receivership Proceedings were greatly exaggerated. This conclusion in and of itself would not necessarily affect his credibility. However, his entire testimony has been colored by other incidents which could not have been matters of opinion or mistakes. He has misled the Special Master as to the nature and extent of his services in Ex Parte Manhattan, he has contradicted himself, under oath, on the question of the parties behind him in the *Johnson* case (S. M. 539-543 [fols. 1557-68]). He has made inconsistent but seemingly expedient statements with regard to his alleged contracts with Manhattan and, on the same expedient basis, he has made many other inconsistent or misleading statements as to material facts which cannot be reconciled with what appears to be the real facts disclosed by the record. Finally, Franklin testified unequivocally that there was a meeting of the Manhattan Board of Directors on July 2, 1940. For reasons hereinafter set forth, it has been conclusively established, in my opinion, that no such meeting was held and the minutes of the meeting of the Manhattan Board of Directors purporting to report such a meeting are in fact false. For these reasons, among others, I have been unable to accept much of Franklin's testimony concerning the facts in issue and have found it necessary to check a substantial portion of such testimony against the printed record (R. R.) and the official stenographic minutes (R. M.) of the Receivership Proceeding."

Such conduct on Franklin's part was tantamount to a fraud on the Court which of itself would justify the denial of any allowance. Even where an attorney's misstatements or misrepresentations have been collateral rather than, as here, directly concerned with the issues involved, the courts have disallowed compensation. *Duffy* v. *Colonial Trust Company*, 287 Pa. 348, 135 Atl. 204 (1926), cert. den. 273 U. S. 765 (1927); *In re Carr*, 116 Fed. 556 (D. C., N. C., 1902); *In re Thomasson's Estate*, 347 Mo. 748, 148 S. W. (2d) 757 (1941); 5 Am. Jur., "Attorneys at Law", §169, p. 363.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 29, 1945.

Respectfully submitted,

IGNATIUS M. WILKINSON,
Corporation Counsel,
Solicitor for Respondent,
The City of New York.

LEO BROWN,
LOUIS M. WEINTRAUB,
BENJAMIN OFFNER,
of Counsel.

(13)

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PETITIONERS' REPLY BRIEF

February 7, 1945.

CHARLES FRANKLIN,
Counsel for Manhattan Railway Company and Pro Se, Petitioners.

SUBJECT INDEX

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I. The opposing brief does not deny (a) that its opposition to payment of petitioner's compensation is based on the theory that Article Six, paragraph 8-d of the Unification Plan covered only the liability of the receivership estate; or (b) that the District Court so decided, basing its allowance of $20,000 for eight years' work on the City's requested interpretation; or (c) that such construction was erroneous 1

II. The Court was prevented from exercising discretion in respect to petitioner's services by the City's insistence that any allowance to petitioner must be restricted to services directly benefiting the estate. Such demand necessarily excluded all of petitioner's general counsel work and virtually all solicitor services over the eight-year period 3

III. The City Brief (p. 8) has erroneously interpreted the Borah Act 5

IV. In reply to baseless personal attacks that have deprived petitioner of compensation for duly authorized continuous legal services which began over twelve years ago 6

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